

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL FAIN,

Plaintiff,

v.

Civil Action No. 5:10CV32  
(STAMP)

DR. GREG KISHNER and  
WEXFORD HEALTH SOURCES,

Defendants.

MEMORANDUM OPINION AND ORDER  
AFFIRMING AND ADOPTING REPORT AND  
RECOMMENDATION OF MAGISTRATE JUDGE

I. Background

The pro se<sup>1</sup> plaintiff, Michael Fain, commenced this civil action by filing a complaint pursuant to 42 U.S.C. § 1983. The case was referred to United States Magistrate Judge John S. Kaull for initial review and recommendation pursuant to Local Rule of Prisoner Litigation Procedure 83.01 et seq. and 28 U.S.C. §§ 1915(e) and 1915A.

On March 17, 2010, the plaintiff was granted permission to proceed as a pauper under 28 U.S.C. § 1915, assessed the entire \$350.00 filing fee, and directed to pay an initial filing fee of \$8.01. The court thereafter issued an order for the plaintiff to show cause as to why the case should not be dismissed for failure to prosecute after he failed to pay the initial partial fee. In response, the plaintiff filed a motion to dismiss his case without

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<sup>1</sup>"pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1341 (9th ed. 2009).

prejudice, advising the court that he was unable to pay the required filing fee, and that he needed additional time to prepare his case.

On May 2, 2010, the magistrate judge issued a report and recommendation, recommending that the plaintiff's motion to dismiss his case without prejudice be granted, and that this case be dismissed without prejudice. Nevertheless, the magistrate judge informed the plaintiff that he was not relieved of the entire \$350.00 filing fee. Magistrate Judge Kaull also advised the parties that, pursuant to 28 U.S.C. § 636(b)(1)(C), any party may file written objections to his proposed findings and recommendations within fourteen days after being served with a copy of the magistrate judge's recommendation. Neither party filed objections. For the reasons set forth below, this Court affirms and adopts the report and recommendation of the magistrate judge.

## II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. However, failure to file objections to the magistrate judge's proposed findings and recommendations permits the district court to review the recommendation under the standards that the district court believes are appropriate and, under these circumstances, the parties' right to de novo review is waived. See Webb v. Califano, 468 F. Supp.

825 (E.D. Cal. 1979). Accordingly, this Court reviews the report and recommendation of the magistrate judge for clear error.

### III. Discussion

Pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, the magistrate judge held that the plaintiff's motion to dismiss should be granted. Nevertheless, because the plaintiff is proceeding pro se, the magistrate judge informed the plaintiff that upon the dismissal of this case, he is still required to pay the entire \$350.00 filing fee assessed when he was granted in forma pauperis status. See 28 U.S.C. § 1915(b)(1) (stating that "if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee"). A voluntary dismissal of this case, therefore, does not relieve the plaintiff of this filing fee obligation.

This Court has reviewed the record, and holds that the magistrate judge's report and recommendation is not clearly erroneous. Accordingly, the report and recommendation is affirmed and adopted.

### IV. Conclusion

Because the parties have not objected to the report and recommendation of the magistrate judge, and because this Court finds that the magistrate judge's recommendation is not clearly erroneous, the ruling of the magistrate judge is hereby AFFIRMED and ADOPTED in its entirety. Accordingly, for the reasons set forth above, the plaintiff's motion to dismiss his case without

prejudice is GRANTED, and the plaintiff's complaint is DISMISSED WITHOUT PREJUDICE. It is further ORDERED that this case be DISMISSED and STRICKEN from the active docket of this Court.

Moreover, this Court finds that the plaintiff was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action will result in a waiver of appellate rights. Thus, the plaintiff's failure to object to the magistrate judge's proposed findings and recommendation bars the plaintiff from appealing the judgment of this Court. See 18 U.S.C. § 636(b)(1); Wright v. Collins, 766 F.2d 841, 845 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this memorandum opinion and order to the pro se plaintiff by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is directed to enter judgment on this matter.

DATED: June 16, 2010

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE